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Before the
Federal Communications Commission
Washington, D.C. 20554

APR 1 1996

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In the Matter of)
)
Implementation of Section 302 of)
the Telecommunications Act of 1996)
)
Open Video Systems)

CS Docket No. 96-46

COMMENTS OF ACCESS 2000

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COMMENTS OF ACCESS 2000

Access 2000¹ submits the following comments in response to the Notice of Proposed Rulemaking (hereafter Notice) in the above titled proceeding.

Access 2000 believes that the open video system (OVS) concept developed by Congress holds the potential to increase diversity and choice in programming, and provide new business opportunities for independent producers. We have been involved in a variety of video dialtone proceedings before the Federal Communications Commission (FCC) and we participated in the legislative process leading to passage of the Telecommunications Act of 1996 to promote not only our unique business interests but the complimentary goals of programming diversity and consumer choice. We are participating in this proceeding as a natural outgrowth of our previous activities, and because we believe the decisions made by the Commission in this rulemaking are critical to achieving OVS's potential.

Introduction

Access 2000 urges the FCC to implement Section 302 of the Telecommunications Act of 1996 with minimum regulatory requirements

¹ Access 2000 is a membership organization of independent film, television, video and new media producers whose mission is to maximize access to new media and technology-based markets for its members' products. Access 2000 aims to promote its membership's interests by articulating members' needs and concerns to regulatory bodies, distributors, investors and the public.

and maximum flexibility to encourage telephone companies to opt for the open video system model for their video programming services.

Access 2000 participated in proceedings before the FCC on the Commission's video dialtone rules (VDT). Throughout those proceedings, Access 2000 indicated its strong preference for VDT over the closed cable model. We argued that the VDT model could create new business opportunities for independent producers as program providers looked for new programming. Independent producers could also have become, although we thought this less likely, programmers, offering their products directly to consumers over a VDT network.

For a variety of reasons, VDT did not work. With the new OVS model created by the 1996 Act, the Commission now has an opportunity to realize many of the benefits of VDT, if it creates a regulatory environment that allows the maximum flexibility in developing the business case for OVS.

Telephone companies will only opt for the OVS model if they believe that they can compete with the incumbent cable operator. We are concerned that local telephone companies appear to be choosing a closed cable model for their video programming business. Using the closed cable model, telephone companies can compete with local cable operators and consumers will enjoy a wider variety of programming choices and lower prices. The OVS model offers far more alternatives for consumers and not only price competition but new pricing models running the gamut from competing packages of programming to full, a-la-carte programming menus.

Toward this goal of encouraging telephone companies to opt for the OVS model, Access 2000 makes the following initial comments on several items in the Notice.

I. OVS Operator Should Be Allowed to Market Channels It Did Not Select

We support the Commission's tentative conclusion that an OVS "operator or its affiliate should be permitted to market to subscribers the programming services selected by other, unaffiliated video programming providers."² We believe that the Commission should clarify that the OVS operator or its affiliate is under no obligation to market to subscribers all of the programming services offered by other, unaffiliated video programming providers. Further, we believe that the OVS operators should have the ability to market programming services selected by others even if the OVS operator or its affiliate or another subsidiary of its parent corporation has a financial interest in the programming.

II. OVS Operators Should Be Allowed to Charge Different Carriage Rates for Different Categories of Video Programmers

Subsection 653(b)(1)(A) of the Telecommunications Act of 1996 requires that "rates, terms, and conditions" for carriage be "just and reasonable and ... not unjustly or unreasonably discriminatory." The Commission asks whether or not it is permissible for OVS operators to "charge different rates to different categories of video programming -- e.g., not-for-profit

² Notice at par. 27.

programmers, home shopping programmers, or pay-per-channel or pay-per-program programmers."³ Allowing OVS operators to charge different rates for different categories of programming is permissible and in the public interest. We believe that within each of these categories the Commission should require that rates for carriage be "just and reasonable and ... not unjustly or unreasonably discriminatory," but that between categories, the OVS operator should have a fair degree of latitude.

III. OVS Operators Should Be Allowed to Allocate Capacity to Programmers on a Prospective Payment Arrangement

Access 2000 is concerned that, as regards rates, terms and conditions, the Commission is looking at the OVS model through VDT glasses. Under the VDT model, video programmers lease or rent capacity on the network. This is not surprising given that VDT is a common carriage model and that the Commission first adopted the model at a time when local telephone companies could not own programming. VDT was designed to encourage telephone companies to build video delivery networks and sell or lease space on the network to others who would provide video programming.⁴ Local telephone companies were to be landlords and each apartment, i.e., channel, would cost the same.

³ Notice at par 32.

⁴ The Commission's VDT rules did allow local telephone companies to have an ownership interest of up to five percent of the programming distributed over the network. The Commission felt that this was needed to provide an extra added incentive for local telephone companies to build video dialtone networks.

OVS is a hybrid model lying somewhere between the closed cable model and a common carriage model like VDT. As such it should draw from the best of both. Therefore, OVS operators should be allowed to develop prospective payment models and apply those models to categories of video programmers. Payment could be based upon the number of subscribers, or set as a fixed percentage of a video programmers revenues. OVS operators and their affiliates should be allowed to develop other business and financial models to develop or license programming that would be distributed over the OVS network. Such arrangements could include underwriting production costs and eliminating the need for an up-front payment or entry fee into the OVS network.

IV. The Commission Should Issue General Guidelines and Allow the OVS Market to Develop Taking Corrective Action as Needed

At several points in the Notice the Commission asks, in essence, if it would be best to adopt a minimum of regulatory requirements, closely monitor development in the OVS market, and take corrective action if necessary. For example, in regards the allocation of capacity among video programmers, the Commission notes:

One approach would be to adopt a regulation that simply prohibits an open video system operator from discriminating against unaffiliated programmers in its allocation of capacity, we would allow the open video system operator latitude to design a channel allocation policy consistent with this general rule. The Commission would rule on complaints alleging discrimination on a case-by-case basis, and, if a violation were found, could require carriage and/or award damages to any such person denied carriage, or provide any other remedy available under the Communications Act. Such an approach would


provide operators with maximum business flexibility. In addition, this approach may be the most effective in encouraging telephone companies to begin providing service over open video systems.⁵(emphasis added)

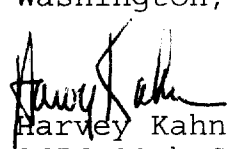
Access 2000 concurs with the view that the Commission should allow maximum business flexibility while reserving its ability to review developments and rule on complaints filed by interested parties as regards the allocation of channel capacity and other issues outlined in the Notice.

CONCLUSION

Access 2000 urges the Commission to establish incentives telephone companies to build and operate OVS networks. The OVS model is superior to the closed cable model. The Commission should provide for maximum business flexibility, minimum regulation, and appropriate oversight and review.

Respectfully submitted,


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⁵ Notice at par. 12.